In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1447

TERRELL MACHINE CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45a–48a) has not yet been officially reported. The Board's decision and order (Pet. App. 33a–41a) are reported at 173 NLRB No. 230.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1970 (Pet. 1). The petition for a writ of certiorari was filed on April 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

384-519—70

QUESTION PRESENTED

Whether the majority status of a union which has been certified by the National Labor Relations Board may be presumed to continue upon expiration of the certification year, absent a showing by the employer that (1) the union, in fact, no longer enjoys majority support, or (2) he has reasonable grounds for so believing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at page 2 of the petition.

STATEMENT

On July 3, 1967, after more than 20 years of an uninterrupted collective bargaining relationship (A. 177, 202)[1] and in the midst of contract negotiations, the Company withdrew recognition from the Board-certified representative of its employees, the International Association of Machinists, Local 1725. It stated that the contract negotiations would be resumed only if the Union came forward with documentary proof of its continued majority status (A. 182, 202–203; 107–108). Although the Union initially relied on its 20-year-old Board certification and refused to take this action, about 3 weeks later it consented to prove its representative status in any agreeable manner (A. 182–185, 203; 16, 110–112). The Company responded that, because of certain in-

[1] "A." refers to portions of the record printed as an appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tervening events, it was no longer interested in a check of the Union's majority and categorically refused to deal with it further (A. 184–185, 203; 113, 16). It then unilaterally announced that there definitely would be a wage raise in the next several months (A. 186, 203; 113, 162)—although it had stymied the preceding negotiations by insisting that no wage readjustment was possible (A. 177–179, 181; 75, 77, 80, 83, 107, 163, 167, 169).

On these facts, the Board held that the Company's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act. It found that the Company had no reasonable basis for doubting the Union's continued majority, but had asserted a doubt in order to avoid its bargaining obligation. The Board ordered the Company, *inter alia*, to bargain collectively with the Union, upon request (Pet. App. 39a–40a, 29a).

The court of appeals sustained the Board's findings and enforced its order. The court applied the following rule of law (Pet. App. 47a):

> Upon expiration of the original certification year, a rebuttable presumption of representative status exists, and it is sufficient to establish *prima facie* a continuing obligation to bargain. * * * The presumption may be overcome * * * if the employer demonstrated that the union, in fact, no longer enjoyed majority support on the date of the refusal to bargain, or that the refusal to bargain was predicated upon a reasonably grounded good faith doubt of majority support. * * *

Finding that neither showing had been made here, the court held that the presumption of the Union's continued majority status had not been rebutted (Pet. App. 47a–48a).[2]

ARGUMENT

1. Petitioner neither raised nor litigated in the prior proceedings its basic position here—that it is improper under the Labor Act to presume that an incumbent union, once certified, continues to enjoy majority status. Rather, petitioner argued to the Board and court below only that it had, in fact, effectively rebutted that presumption (Pet. App. 36a–39a, 46a). Thus, the issue which petitioner now seeks to raise is not properly presented. *National Labor Relations Board* v. *Seven-Up Bottling Co., Inc.*, 344 U.S. 344, 350; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 661–662.

2. In any event, the presumption fully accords with the Act, the pronouncements of this Court, and the consistent decisions of the courts of appeals.

[2] With respect to the question whether the Union was supported by a majority of the employees, the court held that the fact that less than a majority were dues-paying members of the Union was not, of itself, "the equivalent of showing lack of union support" (Pet. App. 47a). Many employees who want continued collective bargaining "are content neither to join the union nor to give it financial support but to enjoy the benefits of its representation" (*ibid.*). Accord: *General Electric Co.* v. *National Labor Relations Board*, 400 F. 2d 713, 727, n. 14 (C.A. 5), certiorari denied, 394 U.S. 904; *National Labor Relations Board* v. *Master Touch Dental Laboratories, Inc.*, 405 F. 2d 80, 83 (C.A. 2); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 591–592 (C.A. 5).

Brooks v. *National Labor Relations Board*, 348 U.S. 96, 98–103;[3] *Bally Case and Cooler* v. *National Labor Relations Board*, 416 F. 2d 902 (C.A. 6); *National Labor Relations Board* v. *Little Rock Downtowner*, 414 F. 2d 1084 (C.A. 8); *National Labor Relations Board* v. *Frick Co.*, 73 LRRM 2889 (C.A. 3). The policy underlying this long and unbroken line of precedent is compelling; if employers were free to withdraw recognition at their unrestricted discretion—without any requirement that they demonstrate some reasonable basis in fact for doubting the union's support—long established bargaining relationships and the employee collective rights attendant to them could be groundlessly interrupted and, as a direct result, industrial peace would be seriously jeopardized.

Nor does this presumption have the effect petitioner claims, of elevating rights of organization over the equally protected right to "refrain" from union activity (Pet. 6–7, 10). That is a right of the employees, not the employer. At the initial stage of recognition or certification, a union—whether previously defeated or not—must *always* demonstrate its majority status

[3] Although *Brooks* specifically involved the irrebuttable presumption that a union's majority continues during the initial certification year, the Court also indicated its approval of the challenged Board interpretation that, after the initial year has passed, the presumption remains in effect but becomes rebuttable. *Brooks*, *supra*, 348 U.S. at 104. See also *National Labor Relations Board* v. *C & P Plaza Dept. Store*, 414 F. 2d 1244 (C.A. 7), certiorari denied, 396 U.S. 1058; *National Labor Relations Board* v. *Rish Equipment Co.*, 407 F. 2d 1098 (C.A. 4); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588 (C.A. 5).

affirmatively, either in an election or on the basis of union authorization cards. That is, if anything, a heavier burden than the "good faith doubt" standard imposes upon the employer who withdraws recognition.[4] Moreover, the showing of 30 percent employee interest which a union must make to obtain an election is precisely matched by the rule that the employees themselves (as opposed to the employer) may obtain a decertification election by showing 30-percent employee support. The requirement that an employer must show reasonable grounds for doubting an incumbent union's majority in order to achieve the same objective, see *United States Gypsum Co.*, 157 NLRB 652, is designed to deter groundless election challenges to established representatives, and in no way inhibits the employees' right to refrain from unionism.

Finally, petitioner argues that, under the rule of *Garment Workers* v. *National Labor Relations Board* (*Bernhard Altmann*), 366 U.S. 731, that an employer violates the Act by granting exclusive recognition to a minority union, it had no choice other than to

[4] As petitioner acknowledges (Pet. 6), Section 9(c)(3) of the Act bars the holding of any new representation election where a valid election has been held in the "preceding twelve-month period."

withdraw recognition; and that, because of the "impossible" burden of rebutting the presumption, it could not take that action without violating the law (Pet. 9–10). This supposed "Hobson's choice" is wholly illusory. *Bernhard Altmann* dealt only with the employer's initial grant of recognition to a new union; where, as here, a formally certified representative is involved, the law is clear that the employer may continue bargaining without jeopardy and "petition the Board for a new election or other relief." *Brooks, supra,* 348 U.S. at 104, n. 18. Moreover, if the employer withdraws recognition immediately, he will not encounter the difficult burden of showing "no majority status" (Pet. 9); he need only demonstrate a reasonably grounded good faith doubt—a burden which is well within the employer's competence. See *National Labor Relations Board* v. *Gallaro,* 419 F. 2d 97, 100 (C.A. 2); *United Aircraft Corp.* v. *National Labor Relations Board,* 416 F. 2d 809 (C.A. D.C.); *National Labor Relations Board* v. *Laystrom Mfg. Co.,* 359 F. 2d 799 (C.A. 7). Petitioner was unable to sustain that burden here because the record shows that its claimed doubt was asserted, not in good faith, but in an effort to destroy the bargaining relationship (see *supra,* pp. 2–3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970